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In The
Supreme Court of the United States

October Term, 1967

No. ~~1436~~ 204

ROBERT C. BOHANNAN, JR., Appellant,

v.

STATE OF ARIZONA, ex rel.
DARRELL F. SMITH,
The Attorney General, Appellee.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

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ROBERT C. BOHANNAN, JR., Appellant,

v.

STATE OF ARIZONA, ex rel.
DARRELL F. SMITH,
The Attorney General, Appellee.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Arizona, entered on December 21, 1966 (rehearing denied January 17, 1967), granting a writ of quo warranto. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Arizona is reported at 421 P.2d 877 (1967), and is not yet in the Arizona reports. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

That the court below had jurisdiction to entertain this cause as a matter of state procedure is expressly held in the decision under review. Its judgment was entered on December 21, 1966, and rehearing was denied on January 17, 1967. Notice of appeal was filed in the Supreme Court of Arizona on April 6, 1967, and the record has been duly forwarded to this Court by the Clerk of the Supreme Court of Arizona. This Court has jurisdiction to review this appeal by virtue of 28 U.S.C. § 1257(2). *Largent v. State of Texas*, 318 U.S. 418, 63 S.Ct. 667, 92 L.Ed. 402 (1943); *Lawrence v. State Tax Comm'n. of Mississippi*, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102 (1932).

QUESTIONS PRESENTED

1. Whether a state statute permitting a "civil" quo warranto proceeding which forever bars a person from holding public office without having given that person a jury trial, or effective representation by counsel, or clear information of the charge against him, or confrontation of witnesses, or freedom from self-incrimination, or any of them, violates the due process clause of the Fourteenth Amendment of the United States Constitution.

2. Whether a statute which bars a person from holding public office without affording the rights guaranteed by the Fourteenth Amendment of the United States Constitution is a bill of attainder in violation of art. I, § 10 of the United States Constitution.

STATUTE INVOLVED

A.R.S. § 38-447 is as follows:

"Violation of prohibition against acquisition of certain interests by public officers; penalty

An officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing evidences of indebtedness, who violates any provision of such laws, shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison for not more than five years, and is forever disqualified from holding any office in this state."

STATEMENT

This was an action in quo warranto filed in the State Supreme Court of the State of Arizona. When this action was filed on August 30, 1966, appellant was a member of the State Board of Public Welfare of the State of Arizona. The petition alleged that at a previous time, between 1961 and 1962, the appellant had been a member of the State Retirement Board, also a unit of government in the State of Arizona. It alleged that, at that earlier time, appellant was connected with certain mortgage or investment companies and that the Retirement Board of which he was a member purchased mortgages from one of those mortgage companies. The petition further alleged that this was a conflict of interest under state law, and that appellant was therefore barred by Arizona Statute A.R.S. § 38-447, from holding his much later Welfare Board position. The prayer for relief was as follows:

"WHEREFORE, the Petitioner prays that this Court issue its Writ of Quo Warranto to the said Robert C. Bohannan, Jr., requiring him to show cause why his position as a Member of the State Board of Public Welfare should not be declared vacant and why he should not be found to unlawfully hold said office, so that a successor may be qualified as provided by law."

This petition was set for a hearing in the State Supreme Court. Appellant filed a motion to quash the application for a writ of

quo warranto on the express ground that this judgment could be imposed only upon one who has been found guilty of a violation of the statute in a criminal proceeding, which had never happened. The sanction of disqualification from public office imposed by A.R.S. § 38-447 appeared to demand that the officer concerned must be found guilty of a violation of the conflict of interest laws of this state in a criminal proceeding before he could be compelled to forfeit his public office. Not only had the appellant not been found guilty of a violation in a criminal proceeding, but a grand jury of Maricopa County, Arizona, on September 22, 1966, refused to charge the appellant with a violation of the conflict of interest laws of Arizona.*

This motion to quash was denied and the appellant answered, setting forth that the alleged violations were purely technical in that the mortgages in question had been purchased from a Federal Government agency and were conveyed to the state for the identical price for which they were purchased.**

In the briefs following it was expressly argued that "A previous criminal conviction is a prerequisite for the application of" the removal statute.

It will be observed that up to this point the matter was argued essentially as a question of state law—it was contended that the state law did not permit removal prior to a conviction. However, the case as actually decided by the Supreme Court of Arizona on December 21, 1966, found that there was a conflict of interest in

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* As the record shows there had been a preliminary adjudication in a trial court in a civil proceedings of a violation of the conflict of interest law, but this had not then, and has not at the time of the preparation of this document, become a final adjudication.

** We appreciate that the guilt or innocence of the appellant is immaterial to any constitutional defect which is here. However, we would simply note, as the record below clearly shows, that the purchases in question, although large, were on a convenience basis for the state and were approved by the Attorney General for the state agency involved as not violating the conflict of interest laws at the time they were made.

the purchases in question. It found that any person who violated this section "is subject to certain penalties," one of them disqualification from office. The court acknowledged that:

> "Where the constitution or statute of a state provides that a public office is forfeited upon the conviction of a public official for a criminal offense, the conviction is a prerequisite to any proceeding to remove the officer." (App. A, at 19).

However, it made the following holding, which is the core of the present dispute and appeal:

> "Before a fine or imprisonment may be imposed by a court, due process requires a criminal proceeding ending in a conviction. Before a disqualification can be imposed against holding a public office, all that the language of the statute requires is a judicial determination of the fact upon which the disqualification rests." (App. A, at 21).

The court thereupon held that this was a "judicial proceeding" sufficient for the purpose. It excluded the appellant from his office as a member of the State Board of Public Welfare and further found that he "is forever disqualified from holding any public office in this state"; this, it repeatedly said, is a civil disqualification.*

Up to this decision, there had never been any pleading or any request that appellant be adjudicated to be forever barred from holding a public office; this was a brand new element in the decision. The petition for rehearing was directed primarily to this new element. In the petition, p. 4, lines 1-3, it was expressly alleged that "The Determination by this Court as to Respondent's Future Right to Hold Office is Unsound and Unjust, is Beyond the Jurisdiction of the Court, and Denies to the Respondent Very Substantial Federal Constitutional Rights." In the same petition at pp. 6-9, it was expressly argued that permanent disqualification

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* All that the petition asked was that the writ of quo warranto issue to require the appellant to show cause why his office should not be vacated. In fact, there never was any writ or formal judgment, the court declaring its decision to be the judgment; see Appendix B to this Statement.

from office under the procedure of a quo warranto action violated the due process clause of the Fourteenth Amendment of the Federal Constitution. Appellant expressly relied on the language of *United States v. Lovett*, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946), and other authorities developed in the body of this Statement to the effect that a person cannot be permanently barred from holding office under procedures of the sort here used, without notice and in violation of other constitutional rights. Appellant further contended that this permanent disqualification was a bill of attainder, violating art. I, § 10 of the Constitution of the United States, as is also more fully developed herein. The appellee responded contending that what it described as the "dicta" of the *Lovett* decision was inapplicable because it did not apply to civil proceedings.

On January 17, 1967, the petition for rehearing was denied without opinion by the Supreme Court of Arizona. This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

I. *The Federal Question was Timely Raised.*

The actual petition in this case, to which the appellant responded, asked for a writ of quo warranto and asked for nothing whatsoever in respect to permanent disqualification from office. The actual ruling of the court was very different. No writ of any kind was ever issued. Instead the court simply issued its opinion and judgment that, "respondent [is] excluded from the Office of a Member of the State Board of Public Welfare and forever disqualified from holding any public office in the State of Arizona."

As is well established, if a federal question is created by an unexpected decision of a state supreme court, the petition for rehearing is the first and only chance to present the matter to that court, and this is true even though, as here, the petition for rehearing is summarily denied; see Stern & Gressman, *Supreme Court Practice* 99 (3 ed. 1962), and cases cited. There can scarcely be more of a surprise than an adjudication which was not asked

for in the petition nor, for that matter, in any brief which was filed with the court below.*

II. *There is a Substantial Question.*

A. *The Statute Denies Due Process of Law.*

A.R.S. § 38-447 has now been authoritatively held to permit the permanent barring of a person from any future office in his state in a civil proceeding lacking vital elements of due process. As so construed, the statute is unconstitutional.

Disqualification from office is a penalty which makes the act charged infamous. The quality comes from the punishment, not from the label the legislature has put on it; *Ex parte Wilson*, 114 U.S. 417, 426, 5 S. Ct. 935, 29 L. Ed. 89 (1885), and this penalty has been expressly so regarded, *id.* at 939.

> "Disqualification to hold office is certainly a punishment that implies disgrace and infamy. It fixes upon the convicted party a stigma of disgrace and reproach in the eyes of honest and honorable men that continues for life. It is difficult to conceive of a punishment more galling and degrading in this country than disqualification to hold office, whether one be an office seeker or not." *Harris v. Terry*, 3 S.E. 745, 746 (N.C. 1887).

The statute as interpreted conflicts with *United States v. Lovett*, *supra*. That case dealt directly with the problem of bills of attainder in a situation in which certain persons were barred from public service by an Act of Congress, and we shall discuss the case from that standpoint elsewhere in this Statement. But the opinion contains much of a broader implication and it governs here.

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* By its failure ever to enter a formal judgment in this case, the state court avoided the problem presented in A.R.S. § 12-2045. This section expressly provides for the judgment to be entered in a quo warranto case, and contains not a syllable of authority to declare a person forever disqualified from public office. It provides: "When a defendant is adjudged guilty of usurping or intruding into or unlawfully holding an office, franchise or privilege, judgment shall be given that the defendant be excluded from the office, franchise or privilege. The court may also impose upon defendant a fine not exceeding two thousand dollars, which, when collected, shall be paid into the state treasury."

In the *Lovett* case, 328 U.S. at 316, this Court dealt with what it termed a "decree of perpetual exclusion" and said:

> "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, acceptance of bribes by members of Congress, or by other government officials, and interference with elections by Army and Navy officers. [Citations omitted.] Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial."

The imposition of disqualification from office imposes a stigma which can only be imposed by due process, and this means judicial process; the need for procedural safeguards is particularly great. *Cole v. Young*, 351 U.S. 536, 537, 76 S. Ct. 861, 100 L. Ed. 1396 (1956); and on the application of due process requirements to removals (much less disqualification), see *Slochower v. Board of Educ.*, 350 U.S. 551, 555, 76 S. Ct. 637, 100 L. Ed. 692 (1956).

1. The Arizona court holds that a quo warranto proceeding is a sufficient judicial proceeding for this purpose. It holds that the Arizona statute requires no more, saying, "before a disqualification can be imposed against holding a public office, all that the language of the statute requires is a judicial determination of the fact upon which the disqualification rests."

If the Arizona statute means that a permanent disqualification can be imposed upon this kind of a "judicial determination," then the statute is unconstitutional. As is held in *United States v. Lovett*, 328 U.S. at 317, the imposition of this kind of a punishment requires not one element, but two. There must be first, "trial by duly constituted courts." But this is not all; there must be compliance with a second requirement:

> "And even the courts to which this important function was entrusted, were commanded to stay their hands until and unless certain vested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be rep-

resented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him."

This respondent has not in this proceeding had most of those rights.

2. The absolute core of procedural due process is notice and hearing. *Simon v. Craft*, 182 U.S. 427, 21 S. Ct. 836, 45 L. Ed. 1165 (1901); *Jacob v. Roberts*, 223 U.S. 261, 32 S. Ct. 308, 56 L. Ed. 429 (1912); *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948). Notice and hearing means notice and hearing on the matter for which the respondent is held responsible, not notice and hearing on something else, *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948). It is imperative that there be a reasonably close relationship between the charge made and the Court's result to meet the requirements of due process; see dissenting opinion of Black, Douglas and Rutledge, JJ., *Kovacs v. Cooper*, 336 U.S. 77, 99, 69 S. Ct. 448, 93 L. Ed. 513 (1949).

This case is below the due process standard. Respondent was brought into court under a statute which expressly provides for the form of judgment which may be given, and which is clearly limited to exclusion from the office he holds: A.R.S. § 12-2045. He responded to a petition which asked no more than this. In consequence, not a word was said in the briefs on either side suggesting or arguing the appropriateness of permanent disqualification from office. Yet the judgment below is that the statute permits this. We submit:

1. Petitioner was effectively convicted of a charge not made; the procedure utilized violates fundamental due process rights. "Conviction upon a charge not made would be sheer denial of due process," *DeJonge v. State of Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937); *Cole v. Arkansas*, supra,

333 U.S. at 201, 68 S. Ct. at 517 ("It is . . . a violation of due process to send an accused to prison following conviction of a charge on which he was never tried.") *Oyler v. Boles*, 368 U.S. 448, 463, 82 S. Ct. 501, 509, 7 L.Ed.2d 446 (1962) ("Until there is a charge fairly made and fairly tried, procedural due process has not been satisfied.") (Douglas, dissenting); *Spevack v. Klein*, 87 S. Ct. 625, 629 (1967) (appellate court cannot affirm on different theory than one tried below since this would "deny all opportunity" to the defendant to fairly defend against the new theory of the charges).*

2. The statute as construed denies fair notice, as required by the Fourteenth Amendment:

> "Notice is essential so that the citizen has a chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered . . ." *Lambert v. People*, 355 U.S. 225, 228, 78 S. Ct. 240, 243, 2 L. Ed. 2d 228 (1958).

See *Mullane v. Central Hanover Bk & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 685 (1950); *Armstrong v. Manzo*,

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* "Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in these cases." *Windsor v. McVeigh*, 93 U.S. 274, 282, 23 L.Ed. 914, 917 (1876). See also *Reynolds v. Stockton*, 140 U.S. 254, 265-68, 11 S. Ct. 773, 35 L.Ed. 467, 469 (1891); *Barnes v. Chicago, M. & St.P. Ry.*, 122 U.S. 1, 14, 7 S.Ct. 1045, 30 L.Ed. 1128, 1132 (1887) ("Every decree . . . must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case . . . and the issues that have been decided.").

380 U.S. 545, 550, 85 S. Ct. 1187, 1190, 14 L. Ed. 2d 62 (1965) ("Failure to give . . . notice . . . violate[s] the most rudimentary demands of due process of law."); *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—the right to his day in court—are basic in our system of jurisprudence . . ."); *In the Matter of Gault*, 27 S. Ct. Bull. 1677, 1707, n. 54 (U.S. May 15, 1967) ("Indeed, one of the purposes of notice is to clarify the issue to be considered . . ."; notice must be given "sufficiently in advance of the hearing to permit preparation." *Id.* at 1706; "Notice given only at the first hearing is inadequate." *Id.* at 1707; there must be "timely notice, in advance of the hearing, of the specific issues that [the defendant] must meet." *Id.* at 1707.

3. The statute as construed denies fair hearing. "The requirement that parties be notified of proceedings affecting their legally protected interest is obviously a vital corollary to one of the most fundamental requirements of due process—the right to be heard." *Schroeder v. City of New York*, 371 U.S. 208, 83 S. Ct. 279, 282, 9 L. Ed. 2d 255 (1962).

> "But a full hearing—a full and open hearing— requires more than that . . . those who are brought into contact with . . . Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Morgan v. United States*, 304 U.S. 1, 18-19, 58 S. Ct. 773, 776, 82 L. Ed. 1129 (1937).

This right to be heard must be "granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, *supra*, 380 U.S. at 552, 85 S. Ct. at 1191; moreover, "the right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues." *Holt v. Virginia*, 381 U.S. 131, 136, 85 S. Ct. 1375, 1378, 14 L. Ed. 2d 290 (1965); it is fundamental to our system of administering justice that the law should "hear before it condemns." *Powell v. Alabama*, 287 U.S. 45, 68, 53 S. Ct. 55, 64, 77 L. Ed. 158 (1932).

4. It denies any effective right to or assistance of counsel on this issue. Historically, the right to counsel "has always included the right to the aid of counsel when desired . . ." *Powell v. Alabama, supra,* 287 U.S. at 68, 53 S. Ct. at 64.

> "The right to be represented by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. [Granting the right to counsel] without affording an opportunity for a hearing on a 'critically important' decision is tantamount to denial of counsel." *Kent v. United States,* 383 U.S. 541, 561, 86 S. Ct. 1045, 1057, 16 L. Ed. 2d 84 (1966).

Due process requires that an individual be able "to present defenses he may have to an action." *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 423, 35 S. Ct. 625, 628, 59 L. Ed. 1027 (1915); this right to counsel necessarily embodies a "right to file motions and pleadings essential to present claims and raise relevant issues." *Holt v. Virginia, supra.* A party's counsel must be given an opportunity to effectively participate in the proceedings. He must have adequate opportunity "to permit preparation." *Gault, supra,* at 1706. All of those procedural due process rights secured to a defendant "are meaningless—an illusion, a mockery —unless counsel is given an opportunity to function." *Kent v. United States, supra,* 383 U.S. at 561, 86 S. Ct. at 1057.

5. The procedure compels self-incrimination. Here the appellant moved to quash the application for the writ. Upon the court's denial of that motion, he had no choice but to answer in this "civil proceeding" or be construed to have admitted the allegations; Rule 8(e) Arizona Rules of Civil Procedure, 16 A.R.S. Because a civil procedure was invoked, the Arizona Court could thus extract the so-called "admission" which is the sole basis of that court's conclusion of guilt. Utilization of this procedure in what is at least a "quasi-criminal" proceeding denied petitioner his Fifth Amendment right to be free from self-incrimination.

> "It is . . . clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission

and the exposure which it invites. The privilege may . . . be claimed . . . if the statement is or may be inculpatory." *In the Matter of Gault, supra,* at 1722.

This "option" offered petitioner—to be ousted from his position or to pay the penalty of self-incrimination — "is the antithesis of free choice to speak out or to remain silent." *Stevens v. Marks,* 383 U.S. 234, 241, 86 S. Ct. 788, 792, 15 L. Ed.2d 724 (1966). The "choice" given petitioner put him to a choice "between the rock and the whirlpool." *Id.* at 243, 86 S. Ct. at 793. Use of this procedure contravenes specific principles laid down by this Court recently in Fifth Amendment cases, and generally contravenes the whole spirit of the Amendment. *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S. Ct. 1489, 1493, 12 L. Ed. 2d 653 (1964); *Spevack v. Klein,* 87 S. Ct. 625, 628, (1967); *Garrity v. State of New Jersey,* 87 S. Ct. 616 (1967); *In the Matter of Gault, supra.*

6. In transcending the normal bounds of quo warranto, the statute as construed effectively denies the right of trial by jury, *cf. Kennard v. Louisiana,* 92 U.S. 480 (1876); the right of the defendant to be informed of the nature of the accusation against him, *In the Matter of Gault, supra,* at 1706; *cf. Schroeder v. City of New York, supra,* 371 U.S. at 212, 83 S. Ct. at 282; and the right to confront witnesses, *Pointer v. State of Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); *Greene v. McElroy,* 360 U.S. 474, 492, 496-97, 79 S. Ct. 1400, 1411, 3 L. Ed. 2d 1377 (1959); all in violation of the Sixth Amendment to the Constitution of the United States, as made applicable to the states by the Fourteenth Amendment. Quo warranto cannot be stretched to impose penalties of criminal nature without importing the procedures which go with such penalties. See generally, *United States v. Lovett, supra; Kennard v. Louisiana, supra.*

B. *The Arizona Statute, as Construed, is a Bill of Attainder and Violates Article I, § 10 of the Constitution.*

The Arizona statute as construed permits a person to be forever disqualified without the normal procedures of due process

attendant upon a judicial trial. The Act itself is unconstitutional as a bill of attainder.

Exclusion from public employment in these circumstances is a punishment, as has been earlier argued "A bill of attainder is a legislative Act which inflicts punishment sans a judicial trial." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323, 18 L. Ed. 356 (1867). This applies to all legislative acts, "no matter what their form," *United States v. Lovett*, 328 U.S. at 315, at least where they apply punishment to easily ascertained persons without a judicial trial. This proceedings has not been a "judicial trial" as defined and required by *United States v. Lovett, supra. Cf., United States v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted in this cause.

Respectfully submitted,

John P. Frank

Attorney for Appellant

May, 1967

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

STATE OF ARIZONA, ex rel. DARRELL F. SMITH, The Attorney General, Petitioner, v. ROBERT C. BOHANNAN, JR., Respondent.	No. 8841

Original Proceeding in Quo Warranto

Respondent excluded from the Office of a Member of the State Board of Public Welfare and forever disqualified from holding any public office in the State of Arizona.

Darrell F. Smith, The Attorney General,
Philip M. Haggerty, Special Counsel,

Attorneys for Petitioner

Lewis, Roca, Scoville, Beauchamp & Linton,
John P. Frank, and
Thomas A. Latta, Phoenix,

Attorneys for Respondent

PER CURIAM.

This is an original proceeding in quo warranto filed in this Court in the name of the State of Arizona out of the relation of Darrell F. Smith, Attorney General, against Robert C. Bohannan, Jr., a member of the State Board of Public Welfare. Jurisdiction was accepted on September 27, 1966, pursuant to Article 6, § 5, subsec. 1, Constitution of Arizona and after the filing of briefs submitted for decision on November 22, 1966.

By statute, a state official is prohibited from having an interest

directly or indirectly in any purchase made by a board of which he is a member.

> "A. Members of the legislature or state, county, city, town or precinct officers shall not be interested directly or indirectly in any contract or in any sale or purchase made by them in their official capacity, or by any body or board of which they are a member." A.R.S. § 38-446.

The facts admitted in this Court establish that from January 1, 1961, to March 12, 1962, respondent was president and a director of the Associated Mortgage and Investment Company, an Arizona corporation, and also a member of the Arizona State Retirement Board; that during this time Arizona Mortgage and Investment Company sold mortgages in an amount in excess of three million dollars to the Arizona State Retirement Board as investments for the state retirement fund.

It is, we believe, accepted without dissent that public officers must have no personal interest in transactions with the government which they represent. The rule is most aptly stated in Stockton Plumbing and Supply Co. v. Wheeler, 68 Cal.App. 592, 229 Pac, 1020:

> "The principle upon which public officers are denied the right to make contracts in their official capacity with themselves or to be or become interested in contracts thus made is evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed." 68 Cal.App. 592, 601.

This Court said in Williams v. State, 83 Ariz. 34, 315 P.2d 981:

> "In order that he [the public officer] act only for and on behalf of the state's interest, it is imperative that he have no personal interest that might clash or conflict with that of the state. * * * Public policy requires that personal interests not exist as a possible factor influencing a public official in the performance of his duties."

We also said in removing by quo warranto an attorney general of this state for official misconduct:

"The object of the removal of a public officer for official misconduct is not to punish the officer, but to improve the public service. The public interest demands that public affairs be administered by officers upon whom rests no stigma * * * of any offense involving a violation of their official duties." State ex rel. DeConcini v. Sullivan, 66 Ariz. 348, 359, 188 P.2d 592, 599.

As a member of the State Retirement Board, it was respondent's obligation to invest the funds of the state retirement system, A.R.S. § 38-743, and, in doing so, to pass upon the desirability of investments in order to insure the solvency of the retirement system. As president and a director of Associated Mortgage, it was his duty to further the interest of the corporation and to actively work for its financial betterment.

Respondent, as president and director of Associated Mortgage and Investment Company and as a member of the Arizona State Retirement Board, was obviously representing diverse and inconsistent interests since the interest of one must necessarily be sacrificed to the interest of the other.

By § 38-447, A.R.S., an officer who violates § 38-446 is subject to certain penalties.

"An officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing evidences of indebtedness, who violates any provision of such laws, shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison for not more than five years, and is forever disqualified from holding any office in this state." A.R.S. § 38-447.

The Arizona Legislature did not consider the violation of § 38-446 as a trivial or minor infraction. Punishment by imprisonment in the state penitentiary makes the offense a felony.

Respondent urges that § 38-447 has no application because there must be some benefit to him resulting in a profit before a violation of the law exists. We do not pause long in contempla-

tion of this point. It is conduct which *may* be detrimental to the interests of the state which the statute seeks to prohibit.

But were it otherwise, respondent's personal profit is clearly evident. The records of the State Retirement Board, of which we take judicial notice, 9 Wigmore on Evidence, 3rd Ed., 537, 538, § 2568a; cf. Climate Control v. Hill, 86 Ariz. 180, 342 P. 2d 854, establish that the written agreements between Associated Mortgage and Investment Company and the Retirement Board provide for payments each year by the board to the mortgage company of one-half of one percent per annum of the outstanding principal balance on the mortgages as a service charge. Associated Mortgage, as a minimum, profits by the agreements to the extent of one-half of one percent on three million dollars, and respondent, as its president and director, profits indirectly as the company prospers and directly in proportion to his stockholdings.

Nor does the fact, *if* it be a fact, that respondent did not participate by voting as a board member for the purchase of these mortgages detract from the unlawfulness of his conduct. A public body is entitled to have the active service of its officers. See City of Ensley v. Hollingsworth & Co., 170 Ala. 396, 54 So. 95. If, by nonparticipation, respondent could avoid the duties of his office, he would be using this violation of his duties to justify the breach of the others. It has been held that prohibitory statutes are applicable where the public officer had nothing at all to do with the transaction, Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431, and where the public officer was not present to vote but had taken part in the preliminary negotiations, Stockton Plumbing and Supply Co. v. Wheeler, supra.

Respondent argues that this Court lacks jurisdiction entirely to determine this matter or, in its sound discretion, ought not to exercise its jurisdiction. It is urged that there is another action pending in the Superior Court of Maricopa County between respondent and the State Retirement Board in which the Retirement Board, as cross claimant, seeks to recover the profits which

Associated Mortgage and Investment Company made out of the prohibited contract, and that the action in this Court constitutes a splitting of the State's cause of action against Bohannan prohibited by the Rules of Civil Procedure.

In this, respondent's position is wholly without merit. The original jurisdiction of the Supreme Court is fixed by the Constitution, supra, and in matters of public importance such as this we will take jurisdiction regardless of whether one of the parties has invoked the jurisdiction of an inferior tribunal.

Moreover, the petition here is not a splitting of a cause of action. The parties in the superior court are Bohannan and others against the State Retirement Board. The action here is against Bohannan by the State of Arizona. The State and the State Retirement Board are individual legal entities. Both have the power to sue and be sued, each independent of the other. A.R.S. §38-743. The State of Arizona is not a party to the suit in the superior court and would not be foreclosed by a judgment there from invoking the criminal penalties prescribed in § 38-447 or the civil disqualification from forever holding public office.

Respondent's principal argument in resisting quo warranto is predicated on the theory that there must be a previous criminal conviction for the offense prohibited by the statute before he is subject to the disqualification set forth in the last clause of § 38-447. He argues that when originally enacted by the Territorial Legislature in 1901 § 38-446 was contained in the civil code and § 38-447 was contained in the penal code; that only thereafter were the two sections brought together in subsequent revisions. The premise of respondent's argument is that where the constitution or statute of a state provides that a public office is forfeited upon the conviction of a public official for a criminal offense, the conviction is a prerequisite to any proceeding to remove the officer. This is, of course, the rule in Arizona, as elsewhere. State ex rel. DeConcini v. Sullivan, supra.

From this premise, respondent presses upon this Court a state-

ment from an annotation in 119 A.L.R., at page 741. Since it embodies his theory of defense, we quote directly therefrom:

> "Misconduct upon the part of a public officer is not of itself ground for forfeiting his office upon proceedings in quo warranto unless such misconduct has been already judicially established or unless the acts of misconduct charged are declared by statute ipso facto to work a forfeiture of his office."

Respondent's argument stems from the fact that his misconduct has not yet been judicially established. We think, however, that the correct rule is stated in State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 S. W. 2d 941 (1938), 119 A.L.R. 710, cert. denied 364 U.S. 823, 5 L. Ed. 2d 52. There the Court held:

"The rule is stated by standard texts as follows:

> "'Quo warranto will also lie for the purpose of ousting an incumbent whose title to the office has been forfeited by misconduct or other cause. And in such a case it is not necessary that the question of forfeiture should ever before have been presented to any court for judicial determination, but the court, having jurisdiction of the quo warranto proceeding, may determine the question of forfeiture for itself. The question must, however, be judicially determined before he can be ousted. * * *' Mechem, Public Officers, Sec. 478, p. 308."

In the present case, respondent has admitted the acts which the legislature has prohibited. He has acknowledged that the transactions were consummated while he was a member of the Arizona Retirement Board and president and director of the Associated Mortgage and Investment Company. This is, in effect, a determination of those facts. We are not constrained to hold that this Court, upon the admission before it of a public offense, is so impotent as to be unable to apply the civil penalty of disqualification expressly provided by the legislature.

Respondent interprets § 38-447 as meaning that an officer who violates the statute shall be punished by disqualification from public office only after a criminal conviction for the offenses prohibited. We do not so construe it. Courts will not read into

a statute something which is not within the manifest intent of the legislature as gathered from the statute itself. State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P. 2d 774.

The statute, § 38-447, supra, does not provide that the officer shall be forever disqualified from holding an office upon conviction of a felony as do many statutes. See A.R.S. § 38-291. In essence, it provides two consequences for its violation: (1) A fine or imprisonment and (2) disqualification from forever holding public office. Before a fine or imprisonment may be imposed by a court, due process requires a criminal proceeding ending in a conviction. Before a disqualification can be imposed against holding public office, all that the language of the statute requires is a judicial determination of the fact upon which the disqualification rests.

> "The general rule with respect to a public official is that eligibility to hold office is of a continuing nature and must exist not only at the commencement of the term but during the occupancy of the office. Some of the courts of other states hold that the date of election or appointment is the time to test eligibility to hold office. But most of the courts hold that even though a candidate is qualified at the time of his election this is not sufficient to entitle him to qualify and continue to hold office, if, at the commencement of the term, or during the continuance of the incumbency, he ceases to be qualified." Valle v. Pressman, 229 Md. 591, 185 A. 2d 368, 377.

The principle has been accepted and applied under varying situations that where a constitution or statute creates a qualification for an office the subsequent loss of the qualification constitutes valid grounds for removal of the officer. See State ex rel. Coe v. Harrison, 217 Ala. 80, 114 So. 905; Helwig v. Payne, 197 Cal. 524, 241 Pac. 884; Jeffries v. Rowe, 63 Ind. 592; State ex rel. Anderson v. Stice, 186 Kans. 69, 348 P. 2d 833; State ex rel. Gray v. Pipes, 173 La. 488, 137 So. 862; State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764; State ex rel. Johnston v. Donworth, 127 Mo. App. 377, 105 S. W. 1055; State ex rel. Good v. Marsh, 125 Neb. 125, 249 N.W. 295; State

ex rel. McMillan v. Sadler, 25 Nev. 731, 58 Pac. 284; State ex rel. Attorney General v. Orr, 61 Ohio St. 384, 56 N.E. 14; Corn v. Yeakel, 13 Pa. Co. Ct. 615; State ex rel. Willis v. Monfort, 93 Wash. 4, 159 Pac. 889; State ex rel. Fugina v. Pierce, 191 Wisc. 1, 209 N.W. 693.

The Supreme Court of Pennsylvania long ago, in 1876, concluded, in disposing of a similar argument that a prior conviction was necessary before the disqualification provisions of a statute were applicable:

> "So that by the time the Commonwealth had followed the defendant to the end of his sinuous path, the contest might become of little real importance; and the victory, if obtained, a barren one." Commonwealth v. Walter, 83 Penn. St. 105, 24 Am. Rep. 154.

Since respondent is not eligible to hold his present office by reason of his prior admitted misconduct, we have no alternative but to order his removal.

It is the judgment of this Court that respondent's motion to quash is overruled, and that respondent, Robert C. Bohannan, Jr., be and he is hereby declared excluded from the office of a member of the State Board of Public Welfare for the remainder of the term ending January 31, 1967, and is forever disqualified from holding any public office in this state.

FRED C. STRUCKMEYER, JR., Chief Justice
JESSE A. UDALL, Justice
LORNA E. LOCKWOOD, Justice
ERNEST W. McFARLAND, Justice

Note: Justice Charles C. Bernstein, having disqualified himself, did not participate in this decision.

APPENDIX B

There is no separate judgment in this record; see the following exchange between counsel for appellant and the Chief Justice of Arizona.

December 23, 1966

The Honorable Fred C. Struckmeyer, Jr.
Arizona Supreme Court
Phoenix, Arizona

Re: *State v. Bohannon*, No. 8841

Dear Mr. Chief Justice:

The rules leave me in some doubt as to the proper post-opinion procedure in respect to the original writs. It is my understanding from all previous cases of the sort in which I have been involved that an actual writ is to issue in this matter.

Therefore:

1. I advise the Court that we shall, within the time provided by law, file a motion for rehearing which will raise legitimate and substantial questions and will not be for purposes of delay. I assume that we have the normal opportunity to do so.

2. I request that the writ not issue pending disposition of our application for rehearing. I advise the Court that in the interim, my client does not intend to seek to exercise any of the prerogatives of office.

3. I further request, if we are entitled to it, that we be given the opportunity to approve or object to the form of the writ, and advise the Court that its content will be at the very heart of our motion for rehearing.

Respectfully submitted,

LEWIS ROCA SCOVILLE BEAUCHAMP
& LINTON

By .....
John P. Frank
Attorneys for Respondent

Copy of the foregoing served
this 23rd day of December, 1966,
on The Attorney General.

Supreme Court
State of Arizona
Phoenix

December 23, 1966

Lewis Roca Scoville Beauchamp & Linton
Lawyers
114 West Adams Street
Phoenix, Arizona 85003

ATTENTION: Mr. John P. Frank
RE: State v. Bohannan, No. 8841

Gentlemen:

Acknowledgment is made of the receipt of your letter of this date pertaining to the above-captioned matter. The final paragraph of the decision dated December 21, 1966, is the judgment of ouster and the Court has requested me to so advise you. We will, of course, give consideration to anything which respondent cares to file with the Court in the future.

Very truly yours,

Fred C. Struckmeyer, Jr.,
Chief Justice

FCSJr:jh

CC: Honorable Darrell F. Smith
The Attorney General

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In The
Supreme Court of the United States

October Term, 1966

No. 204

ROBERT C. BOHANNAN, JR., Appellant,

v.

STATE OF ARIZONA, ex rel.
DARRELL F. SMITH,
The Attorney General, Appellee.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

APPELLANT'S RESPONSE TO MOTION TO DISMISS

John P. Frank
Room 900
114 West Adams Street
Phoenix, Arizona 85003
Attorney for Appellant

TABLE OF CASES AND AUTHORITIES CITED

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In The
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ROBERT C. BOHANNAN, JR., Appellant,

v.

STATE OF ARIZONA, ex rel.
DARRELL F. SMITH,
The Attorney General, Appellee.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

APPELLANT'S RESPONSE TO MOTION TO DISMISS

Appellant has been declared by the court below, in original quo warranto proceedings, to be forever barred from holding public office. The appellant had no opportunity for jury trial; there was no complaint asking for any such relief, or notice of it; and there was thus no clear information of the charge against him, no confrontation of witnesses, no freedom from self-incrimination. Appellant contends that this denies due process and clearly conflicts with the rights specified in *United States* v.

Lovett, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946; and that the statute is, independently, a bill of attainder.

The State replies:

1. The State challenges the substantiality of the federal question. We continue to rest squarely on *United States v. Lovett, supra*, which the State does not mention. We rest further on our earlier argument as to notice, hearing, right to effective counsel, self-incrimination and jury trial, stressing that the State has not seen fit to respond at all to any of the authorities presented.

2. The State contends that we did not timely raise our federal questions. As we pointed out in our opening brief, we first raised those questions on rehearing below. But we had no earlier occasion to do so:

(a) The State never asked for the relief which the court below gave; its sole request was for a show cause order. None was ever issued, and instead a final judgment was handed down. The quo warranto statute (original bf., p. 7, n.) gives as its sole remedy exclusion from office or a fine, but says nothing about permanent bar from office.

(b) Now we know better. Now we know that under Arizona law as declared by the Arizona Court for the first time in this case, a person can be permanently barred from office on an application for a show cause order, without even a request that this be done. Now we know that a remedy statute which expressly prescribes a remedy is to be read as if it prescribed some other and extremely offensive remedy. Now we know that Arizona has a procedure by which a person can be forced to answer and make admissions as here occurred.

But all this is quite a surprise. When a state court opinion takes new ground, which could not reasonably be expected, thus opening a federal question, the claim may be raised on petition for rehearing; it is then "timely, since it was raised at the first opportunity." *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 678, 60 S. Ct. 451, 74 L. Ed. 1107 (1930).

3. The State contends that the opinion rests on the adequate state grounds that a state can "impose reasonable, nondiscriminatory requirements for its public servants." Of course it can. But it cannot create a procedure for determining whether a given public servant has violated those requirements without regard to the Federal Constitution, and, specifically, to the procedures specified in *United States v. Lovett, supra.*

"The failure of the state court to pass upon the federal claim is not conclusive. Only if the non-federal ground is adequate will review be declined." Stern & Gressman, *Supreme Court Practice* 107 (3d ed.), and cases cited. The decision of state law may not "stifle a federal claim" or "evade vindication of federal rights," *id.* at 112. It may not provide a procedure under which federal rights cannot be effectively raised; *Henry v. State of Mississippi,* 379 U.S. 443, 446-47, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965).

Appellant's federal rights under *United States v. Lovett, supra,* have been stifled and evaded. The motion to dismiss should be denied.

Respectfully submitted,

John P. Frank
Attorneys for Appellant.

July, 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BOHANNAN *v.* ARIZONA EX REL. SMITH, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 204. Decided October 9, 1967.

PER CURIAM.

The motion to dispense with printing the motion to dismiss is granted. The motion to dismiss is also granted and the appeal is dismissed for want of a properly presented federal question.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, dissenting.

Appellee applied in the court below for a writ of *quo warranto*. The petition asked that appellant be ousted "from the office he presently holds as Member of the State Board of Public Welfare of the State of Arizona, and [that] his office [be declared] vacant so that a successor may be qualified as provided by law." Appellee referred in its petition and brief to the provisions of Ariz. Rev. Stat. § 38-447, which provides that any official who violates the statutory prohibition against having an interest in contracts made by him in his official capacity "shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison for not more than five years, and is forever disqualified from holding any office in this state." Appellee, however, asked the court below only to require appellant "to show cause why his position as a Member of the State Board of Public Welfare should not be declared vacant and why he should not be found to unlawfully hold said office, so that a successor may be qualified as provided by law."

Appellant filed a motion to quash the application on the ground that under the statutory scheme removal from office could be imposed only upon one who had been found guilty in a criminal proceeding of violating the statutory provisions. That motion was denied. Appellant then answered the application, acknowledging that certain mortgage transactions between the Arizona Retirement Board and the Associated Mortgage and Investment Company took place while he was a member of the former and president and director of the latter. Oral argument was denied, the case being decided on the briefs.

Up to that point, therefore, the matter was presented as a question of state law—it was contended that the state statutes did not permit removal from office prior to a criminal conviction. The court, however, not only ruled that appellant should be excluded from his office as a Member of the State Board of Public Welfare but also "forever disqualified from holding any public office in the State of Arizona." To reach this conclusion, the court construed the Arizona statutes to require a criminal conviction if a fine or imprisonment were to be imposed on the public official, but only a "judicial determination of the fact upon which the disqualification rests," if disqualification were the sanction to be imposed. The *quo warranto* proceeding before the court was held to offer a sufficient "judicial determination of the fact" to exclude appellant from the office he held and to bar him permanently from office.

In his petition for rehearing appellant challenged on federal constitutional grounds the court's use of the civil *quo warranto* proceeding to disqualify him permanently from office. He asserted that the statute, as construed by the court, permitted the permanent barring of a person from public office in a civil proceeding lacking vital elements of due process. Appellant also contended that the statute, as construed, constituted a bill

of attainder since it operated to inflict punishment without the constitutional safeguards of a judicial trial.

It seems obvious that until the court had interpreted the statute in appellant's case to allow permanent disqualification in a *quo warranto* proceeding in which the petition asked only for a show-cause order and that appellant be discharged from his present office, appellant had, as a practical matter, no reason to raise the federal claims he presents to this Court. Appellee did not ask for a declaration of permanent disqualification in its petition for *quo warranto*. The Arizona statute that expressly provides for the judgment to be entered in a *quo warranto* case, Ariz. Rev. Stat. § 12–2045, does not mention permanent disqualification from office. That section provides only that "when a defendant is adjudged guilty of usurping or intruding into or unlawfully holding an office, franchise or privilege, judgment shall be given that the defendant be excluded from the office, franchise or privilege. The court may also impose upon defendant a fine not exceeding two thousand dollars, which, when collected, shall be paid into the state treasury."

If a federal question arises because of an unexpected construction of a state statute by the highest state court, the question is timely raised for purposes of review by this Court if it is presented in the petition for rehearing. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 50 St. Ct. 451, 74 L. ed. 1107.

A declaration that a person is permanently barred from any future public office raises constitutional issues that simple removal from office does not. Such a declaration sweeps broadly and may destroy the individual's right to a livelihood in the field of his greatest competence. The serious nature of any such holding demands that the rules of procedural due process be complied with strictly. I believe that the issues raised are substantial and were properly presented below. Probable jurisdiction should be noted, or at the very least we should take the case and hear it argued, postponing the question of jurisdiction to the merits.